patrol and taken to hospital where he came to. On these facts the learned president found him guilty as charged.

With respect, I do not think the conviction can be upheld, even though the appeal is only against sentence.

Although sub-section (4) of section 15 of the Prevention of Crime Ordinance, 1959, does not contain the word "knowingly" with regard to contraventions or failures to comply with the conditions of the restrictive order imposed, *mens rea* is nevertheless the rule in all offences except in those of absolute liability. The appellant at the relevant time had every intention to get back indoors in time and no intention to commit any breach of the police supervision order to which he was subject. He was out-of-doors at 11.30 p.m. merely through the misfortune of having an accident which, together with the intoxicating liquor he had, caused him to pass out.

In the circumstances, I would not only set aside the sentence but also quash the conviction.

Sentence set aside and conviction quashed.

SUPERINTENDENT OF LANDS AND SURVEYS, SARAWAK v. AIK HOE & CO. LTD.

[F.C. (Thomson L.P., Ong Hock Thye Ag.C.J. (Malaya) and Suffian J.) January 17, 1966]

[K.L. — Federal Court Civil Appeal No. 25 of 1965]

Land laws — Acquisition of land for public purpose — Compensation — 'Market value' of land — Procedure — Land Code (Sarawak Cap. 81).

This was an appeal against the decision of the High Court which increased the compensation payable for land acquired by the Sarawak Government from $237,760 or $5,460 per acre to $607,000 or $13,900 per acre.

Held: on the facts and taking into account all relevant factors the fair market value of the land was $8,000 per acre for the first lot and $9,000 per acre for the second lot.

Cases referred to:—

(1) *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam,* [1939] A.C. 302.

(2) *Maori Trustee* v. *Ministry of Works* [1959] A.C. 1.

(3) *U. P. Government* v. *H. S. Gupta* A.I.R. 1957 S.C. 202.

(4) *Duke of Buccleuch* v. *Inland Revenue Commissioners* [1965] 3 W.L.R. 977.

(5) *Hull & Humber Investment Co. Ltd.* v. *Hull Corporation* [1965] 1 All E.R. 429.

(6) *Nowroji Rustomji* v. *The Government of Bombay* (1929), I.L.R. 49 Bom. 700.

(7) *Assistant Development Officer, Bombay* v. *Tayaballi Allibhoy Bohori* A.I.R. 1933 Bom. 361.

(8) *Collector of Nagpur* v. *Atmaram Bhagwant* A.I.R. 1925 Nagpur 292.

(9) *Nanyang Manufacturing Co.* v. *Collector of Land Revenue, Johore* [1954] M.L.J. 69.

(10) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370, 373.

(11) *Chow Yoong Hong* v. *Tai Chet Siang* [1960] M.L.J. 130.

(12) *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co. and another* I.L.R. 26 Bom. 503.

FEDERAL COURT.

P. J. Mooney for the appellants.

G. S. Hill (*Stephen Yong* with him) for the respondents.

Cur. Adv. Vult.

Suffian J.: The Sarawak Government resumed under Part IV of the Sarawak Land Code (Cap. 81) 19 parcels of lands "for the purposes of residential and industrial development and other public facilities in connection with the new port of Kuching." In due course enquiries were held by the Superintendent of Lands and Surveys, First Division, Sarawak (the present appellant) to determine the compensation payable to the owners. We are not concerned with 17 parcels whose owners accepted the superintendent's award; we are only concerned with two parcels, lot No: 16178 (which I call the first lot) and lot 16179 (the second lot) whose owners, Messrs. Aik Hoe & Co., Ltd. (the present respondents) objected to the superintendent's award.

The owners are entitled by way of compensation to the market value of the lands on the agreed material date 1st April, 1960, section 60(1)(a); so the issue in this matter is simply this, what was their market value on that date. The superintendent decided it was $237,760 or about $5,460 per acre. On appeal by the owners, Harley J., in the Kuching High Court increased it to $607,000 or $13,900 per acre. The superintendent now appeals to this court.

The first lot was transferred to the owners on 11th May, 1949, at a price of $19,000, that is about $700 per acre, and the second lot on the same date at a price of $21,000, that is about $1,200 per acre. The superintendent makes nothing of these prices and rightly so, because these transactions took place long before the material date.

The following facts are not in dispute. Both lots are situate about 4 miles from the State capital Kuching a town of about 50,000 souls at the material time (the Kuching rural area had about 100,000 souls). Both lots front the Pending Road, the first lot to the north and the second to the south of that road. The first lot 25.72 acres in area is, except for about an acre, below the 10-foot contour line, and the second lot 17.82 acres in area is as to about half an acre below the 10-foot contour line and surrounds two

lots known as O.T. 16180 and 16181 used as graveyards. Fill for the low-lying parts of the lands could be obtained from the lands themselves, so as to reduce development costs.

Both lots were at the material date within the Kuching municipality, within a mixed zone area which means that they could be held by non-indigenous proprietors and were classified as town land. Title for both lots was without conditions and for a term of 900 years from 17th July, 1911, and carried the general description "agriculture".

Both lots were undeveloped except for minor improvements on the second, and no permission to subdivide (which was necessary for development) had been applied for for either lot.

There was no electricity or main water supply to any of them. The main supply and electricity stopped at the junction of the Kwong Lee Bank Road and Pending Road about half a mile away to the east.

The material date was 1st April, 1960, the lands acquired were wanted by Government in connection with the new port of Kuching, but it was agreed that the public knew even in 1958 of Government's intended development of the new port because that year Government built the new wharf at Tanah Puteh and this public knowledge affected land prices in the locality.

On 19th September, 1961, at an enquiry before the superintendent, the owners claimed $30,000 per acre.

In the event on 16th March, 1963, the superintendent awarded the owners $237,760 or about $5,460 per acre. Taking into account sales of other lands in the vicinity, he valued the first lot at $121,460 as follows:—

(a) 9.72 acres at $5,500 per acre	=	$ 53,460
(b) 8.00 acres at $4,500 per acre	=	$ 36,000
(c) 8.00 acres at $4,000 per acre	=	$ 32,000
Total		$121,460 (average $4,730 per acre)

and the second lot at $116,300 as follows:—

(a) 6.00 acres at $7,000 per acre	=	$ 42,000
(b) 11.82 acres at $6,000 per acre	=	$ 70,920
Total		$112,920

To this he added $3,380 for improvements and trees on the second lot, making a total of $116,300 (average $6,530 per acre).

Dissatisfied with the superintendent's award, the owners, on 26th April, 1963, applied under section 56 for the compensation to be determined by the High Court, claiming that "the compensation was inadequate and the award cannot be supported having regard to the potentiality and market value of the land and sales of land in the vicinity".

In December, 1964, the Government offered to increase the award as follows:—

(i) first lot	$176,418 (namely $6,860 per acre)
(ii) second lot	$131,360 (namely $7,380 per acre)
Total	$307,778 (average about $7,000 per acre).

This the owners refused.

The reference was heard by Harley J. with the aid of two assessors in Kuching in March, 1965. At the hearing the value of the improvements on the second lot was agreed at $4,000.

The owners called two witnesses including Mr. John Murray Carter, a qualified valuer practising in Singapore. He had been instructed in April, 1963, to inspect and estimate the value of the lands. At first he estimated the lands to be worth $698,000 on the basis among other things that it was necessary to fill some portions of the lands up to 9 foot level. During the course of his evidence he agreed with the superintendent's higher cost to fill to this level and consequently he reduced the estimated market value of the lands as follows:—

(i) first lot	$306,000 ($11,900 per acre)
(ii) second lot	$301,000 ($16,900 per acre)
Total	$607,000 (average $13,900 per acre).

For the superintendent, two witnesses were called, first, Mr. Ambrose Foo, a valuer in the Land and Survey Department, and secondly, Mr. Robert Bell Beatty, a P.W.D. engineer. The hearing lasted four or five days. Immediately after counsel's closing addresses, the judge explained the law and summed up the evidence to the assessors in open court. When he concluded his summing up at about 3.30 p.m. the assessors told him that they would give their opinion at 9 o'clock the following morning.

The following morning the assessors gave the following joint opinion:—

"From the evidence, we the undersigned assessors are of the opinion that the amended claim figure of $607,000 — in page 15 of the report of Mr. J. M. Carter — is a fair one, particularly so when the overall price per acre is $13,900."

In a brief judgment following immediately, the judge agreed and gave judgment as follows:—

"This case involves a comparison of market prices based on an analysis of the evidence. I do not think I can usefully add any general remarks to what I said in my summing-up, of which there is at least one shorthand record. The figure reached by the assessors is close to what I had in mind — it is in fact within 10% of the figure which I should have awarded if I had to give a

judgment completely independent of the assessors. On a commercial matter of fact such as this, I think it is proper to give full weight to the views of the two clearly intelligent assessors who sit with me. I therefore accept their figure of the full amount claimed and give judgment accordingly."

He also ordered the superintendent to pay interest under section 69 and costs under section 67(b).

Counsel for the appellant superintendent was quick to point out that this case was probably unique in the history of compulsory acquisition in that the assessors agreed *in toto* with the market value placed on the land by a valuer called for the owners.

It is unfortunate that the judge's award was very brief and gave no reasons as required by section 66.

In his criticism of the judgment, counsel for the superintendent submitted that in the lower court it was for the objecting owners to satisfy the judge that their valuation was correct and the superintendent's wrong and that the owners had failed to discharge that burden of proof. His criticism may be summarised in these words — the method of Mr. Carter's valuation was unscientific and misleading, it misled the judge and the assessors as can be seen from the summing up and the judgment, it did not take into account certain factors, and therefore the award should be set aside. Counsel hesitated to suggest the correct figure, but he thought that the offer of $7,000 per acre by the Government was the appropriate compensation.

The court's attention was directed by the owners' counsel to the judgment of the Court of Appeal of Sarawak, North Borneo and Brunei in Civil Appeal No. 3 of 1959, in which it was stated that the correct procedure in Sarawak land references should be as follows:—

"The judge should sum up to the assessors..... The assessors then retire and consider their opinion. They should not consult with the judge or any other persons. They then return to court and state their opinion orally and the judge records it (section 63). The judge (unless he decides to adjourn) writes his award which may, or may not, agree with the opinion of the assessors (section 64). The award must comply strictly with section 66. It is the judge who makes the award; the assessors merely express their opinion."

The owners' counsel thought that this procedure was different from that followed in the High Court of Malaya and invited this court to give a ruling so that the procedure would be uniform throughout Malaysia.

In the High Court of Malaya, after closing submissions, the judge does not usually sum up to the assessors in open court, but adjourns the case to enable him to look up the law, to discuss leisurely with the assessors the evidence and the appropriate award to be made. After discussion he puts up a draft written award for the consideration of the assessors. When it and the appropriate award and reasons have been discussed or agreed, he and the assessors return to open court (this may be weeks later), the assessors announce their opinion in open court, the judge records it and reads out his award, agreeing or disagreeing with the assessors' opinion. If the assessors agree with the judge's written award, they sign it.

I have scrutinised the Sarawak Land Code and I find nothing in it making it obligatory for the judge to sum up in every case. I think he has a discretion to sum up or not. In a short and straightforward case he might find it convenient to do so. But in a complex case lasting several days he might regard it as unfair to the assessors to sum up in open court and the three of them might prefer to have the opportunity of a leisurely examination of the land, the evidence and the law and and an unhurried consultation as to the proper award to be made.

It is convenient at this stage to state what in my judgment is the law applicable to the determination of the issue in this matter.

The issue, as already stated, is a simple one: what was the market value of these two lots on the agreed material date 1st April, 1960. In determining this amount the court must not take into consideration any disinclination on the part of the owners to part with the lots resumed nor any increase in the value of the lots likely to accrue from the use to which they will be put when resumed (section 61).

It is common ground that the principles applicable are the same as under the Indian Land Acquisition Act, 1894. Speaking on the Indian principles, Lord Romer expressing the advice of the Privy Council in *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* [1] said at page 312:—

"The compensation must be determined.....by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser.....it may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its 'market value'. But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at 'the market price'..... It is perhaps desirable in this connection to say something about this expression 'the market price.' There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar

positions, and this is what must be meant in general by 'the market value'....."

At page 313 he went on to say that when determining the market value of vacant land its potentialities must be taken into account —

".....it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at a time at which its value has to be determined....., but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that, in ascertaining its value the possibility of its being used for building purposes would have to be taken into account."

He then continued:—

"It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in section 24, sub-section 5, of the Act [corresponding to para. (e) of section 61 of the Sarawak Land Code] and is sometimes expressed by saying that it is the possibilities of the land and not its realised possibilities that must be taken into consideration."

Both the superintendent and the owners in arriving at their respective estimated market values of these two lands, took into consideration their industrial potentialities.

Here in this court counsel for the superintendent further submitted, and I agree with him, that a valuer must also take into account the possibility that the lands might never be so required or might not be so required for a considerable time. In the passage from the judgment of Lord Romer already quoted, his Lordship continued as follows:—

"But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured? In the case instanced above of land possessing the possibility of being used for building purposes,.....any person who has to determine the value .....would probably have before him evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required or might not be so required for a considerable time."

Some 20 years later Lord Keith in giving the judgment of the Privy Council in an appeal from New Zealand, *Maori Trustee* v. *Ministry of Works*,[2] concerning the market value of a parcel of land 91 acres in area suitable for subdivision and sale in subdivided lots but on the material date not yet subdivided, quoted with approval at page 16 the following passage in the judgment of Gresson J.:—

"In my opinion in this case the land must be valued for what it in fact was on the specified date — a tract of land capable as to some, perhaps all of it, of subdivision into building allotments, and of being sold at some time and over some period in that form. That circumstance would influence a purchaser in his determination of price. In estimating what price a purchaser would be willing to pay recourse may be had to an examination of the estimated gross yield from a subdivision as yet notional only, and the estimated deductions that a purchaser would have to take into account; but that is the extent to which a notional subdivision can be regarded. There must be excluded from the court's contemplation retention by the claimant and an assessment of what in his hands it would yield if subdivided; because that course is not open to him. At the time value has to be determined the land was in fact not .....subdivided so as to permit of sale piecemeal. A good deal requires to be done before there can be disposal in that manner, and as well as expenses there will be risk and delay."

The headnote of that decision says that in the case of a large parcel of land suitable for subdivision but as yet not subdivided, in determining the market value thereof the court must contemplate the sale of the land as a whole. If the land had to be valued as a whole, the court, in assessing the potentialities, might take into account the suitability of the land for subdivision, the prospective yield from a subdivision, the cost of effecting such a subdivision, and the likelihood that the purchaser acquiring the land with that object will allow some margin for unforeseen costs, contingencies and profit for himself.

Counsel for the superintendent submitted and I agree that the owners' valuer Mr. Carter had allowed for costs but not for unforeseen costs, contingencies and profit for a prospective purchaser buying to develop.

Mr. Carter was of the opinion that these two lots being 43.54 acres in area were more viable than small lots and that the proposition that small lots are worth more per unit of area than large lots was a fallacy in the development market. Mr. Carter may be right as regards large parcels situate in a densely populated area where there is a large capital surplus, but in my judgment he could not be right as regards these two lots situate as they are in the town of Kuching with a population of only 50,000 people. Common experience has shown that in areas where there is a small population the price per unit of area for a large parcel is less than the price per unit of area for a small parcel. In *U. P. Government* v. *H. S. Gupta* [3] the Supreme Court of India referred to the principle —

".....if.....land has to be sold in one block consisting of a large area, the rate per square foot likely to be fetched would be smaller than if an equal extent of land is parcelled out into smaller bits and sold to different purchasers....."

In *Duke of Buccleuch* v. *Inland Revenue Commissioners*,[4] a case concerning 532 pieces of property belonging to the estate of the tenth Duke of Devonshire which had to be valued for the purpose of estate duty, Lord Denning M.R. said at page 991:—

"It may be, of course, that if you did put those 532 units on the market all at the date of death, [the material date] it might amount to something in the nature of 'flooding the market'; just as would happen if you had a big block of shares and put them all on the market at the same time."

The prospective buyer of these lands for which subdivision permission had not been applied for or granted would also have to take into account that such permission might be refused or delayed and would accordingly adjust his price to cover this risk. In *Hull & Humber Investment Co. Ltd.* v. *Hull Corporation* [5] Pearson L.J. said at page 434:—

"a prospective purchaser, in reckoning what he could offer, would have to take into account the probable expense of obtaining planning permission and the risk that he might not obtain it."

If a prospective purchaser had to consider the question of fill, as was admitted by Mr. Carter, then allowance must be made not only for the cost of fill, as was done, but also for interest on such cost and on cost of development over an uncertain period. In *Nowroji Rustomji* v. *The Government of Bombay* [6] Lord Sumner said at page 704:—

"Development.....[of the kind envisaged for the land in question] required the dedication of a considerable part of the surface, in order to provide an access road, and also the raising of the whole surface to one level, free from risk of flooding, by permanently filling in the cavities with suitable loose material. Estimates of the area of land required for the road and of the cost of filling in per yard were accordingly prepared, and were agreed on both sides. It does not appear, however, that any allowance was made for the time required to enable the main ground to settle or for the risk that unexpected settlements might take place, and probably these factors were beyond any exact estimation."

At page 705 he went on:—

"[The learned judge] took no account of the factor of interest on the cost of the filling in and the other development work during the uncertain interval before the time of realisation might arrive.

.....Factors such as he omitted to notice may be of great importance or of little, or even may be truly negligible, according to the circumstances of the particular case, but it cannot be right to ignore them altogether, as having no place at all in a rigid system of calculation."

Mr. Foo, the Government valuer, in arriving at his estimate took into account only sales up to 1960, Mr. Carter went on to sales in 1962. I agree that the proper thing to do is as stated by Broomfield J. in *Assistant Development Officer, Bombay* v. *Tayaballi Allibhoy Bohori* [7] at page 363:—

".....I doubt if anything can be found in these authorities which would justify the conclusion that post-notification transactions must necessarily be ignored altogether. All transactions must be relevant which can fairly be said to afford a fair criterion of the value of the property as at the date of the notification. If any considerable interval has elapsed the court will naturally attach little or no value to subsequent sales, just as transactions long prior to the notification will usually be discarded."

The headnote to *Collector of Nagpur* v. *Atmaram Bhagwant* [8] reads:—

"Acceptance of collector's award as correct valuation by neighbouring land owners is the best evidence of the correctness of the award by the collector."

I agree with counsel for the superintendent that this goes too far and it is only the acceptance of a large award that could be interpreted as correctness of an award by the superintendent. Recipients of awards in small amounts may be dissatisfied but sometimes do not think it worth while appealing because of the expense and delay involved.

I agree also with the submission that it is for the owners to prove that the award was inadequate. Broomfield J. in *Assistant Development Officer, Bombay* v. *Tayaballi Allibhoy Bohori, supra,* said at page 364:—

"The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand, and if he succeeds in showing *prima facie* that the award is inadequate, then Government must support the award by producing evidence."

In this case the assessors agreed *in toto* with the value put on the lands in question by the expert valuer called by the owners but with respect I agree with Buhagiar J. who said in *Nanyang Manufacturing Co.* v. *Collector of Land Revenue, Johore* [9] (at page 71): —

"'estimates [of value by experts] are undoubtedly some evidence but their value is not great, as expert opinion is liable to err, unless it is supported by, or coincides with, other evidence'.....

I consider that the safest guide to determine the fair market value is evidence of sales of the same land or similar land in the neighbourhood, after making due allowance for all the circumstances."

In determining this appeal, I am of the opinion that the judge's award is a question of fact, as was said by Lord Sumner in the Privy Council in *Nowroji Rustomji* v. *The Government of Bombay, supra,* (at page 702):—

"The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ....."

But the market value put on the lands by the assessors and agreed to by the judge was not a hard fact, but:—

"a finding of fact which is really an inference from facts specifically found" (*per* Viscount Simons in *Benmax* v. *Austin Motor Co. Ltd.*[10]);

the facts specifically found being the agreed prices of lands sold in the neighbourhood and the amounts awarded to other resumed lands; and while an appellate court should not lightly differ from the finding of a trial judge which turned

solely on the credibility of a witness, the same consideration does not apply with regard to a finding of specific fact which is really an inference from facts specifically found.

In determining whether or not the judge had reached the right inference this court would have been greatly assisted if he had complied with section 66 by stating the grounds for his award and in the absence of such grounds this court is entitled to evaluate the evidence *de novo*, as was done in *Chow Yoong Hong* v. *Tai Chet Siang*.[11]

How did Mr. Carter arrive at his estimated market value for the two lots? It is necessary to examine his method for, as already stated, the assessors agreed *in toto* with his conclusion. He explained his method in great detail in a written report submitted to his clients and made available to the court below as Exhibit 8.

Mr. Carter's method was this.

Taking into account sales of certain lands in the vicinity, he gave a commencing value, after making allowances for differences and similarities, of $15,500 per acre for each of the lots in question, assuming they were internal lands above flood level. Then as each lot was on the Pending Road and there would therefore be a saving on access roads he added to these values a saving of $16,500. To this again he added 10% of the total to reflect the value of main road frontage. As can be seen from Exhibit 8, he concluded that the value of the first lot was $17,755 per acre and the value of the second lot $18,070 per acre. But a developer buying this land for residential or industrial purposes could not use all of it. In respect of the first lot he had to deduct 2.2 acres for internal roads and 0.16 acre for earthwork slopes leaving him a net area of 23.36 acres. This net area at $17,755 per acre came to $44,760. A prospective developer before paying this price must deduct the cost of earthworks up to 9 foot level which was agreed at $148,600, so that he would only pay for this land $266,160. As this land has a long title, the prospective purchaser would also be prepared to pay 15% on top of this bringing the price up to $306,080, or in round figure $306,000 that is $11,900 per acre.

As to the second lot, again Mr. Carter took into account the same considerations as for the first lot and after making similar additions and subtractions he estimated that the useable net area came to 15.12 acres and the market value in round figure $301,000 that is $16,900 per acre. Both sides agreed that this lot was superior to the first.

The total estimated value of the two lots was $607,000, equivalent to an overall value of $13,900 per acre.

Mr. Carter arrived at the commencing value of $15,500 per acre on 1st April, 1960, in this way. First he examined the sales of lands in the vicinity listed in Annexure C; of these sales he selected ten as most relevant and these sales he listed in Annexure A-1. He said that prices between 1958 and 1962 were rising and he took into account sales after the material date to establish the trend of the rise. He illustrated this trend by means of graphs. For instance, he said lot 188 half an acre in area resumed by the Government was valued as on 13th August, 1958, by the Court of Appeal at $15,000 per acre. Lot 190, 0.22 acre in area, located on the Pending Road 150 yards from lot 188 was sold in May 1960 at $68,000 per acre, sold again in December 1960 at $91,000 per acre and sold a third time in January 1962 at $159,000 per acre. Therefore, according to his graph Annexure D, the estimated value of these two lands on 1st April, 1960, was $64,000 per acre. But I agree with counsel for the superintendent that the sale price of these two lots has no relevance to the market value of the two lands in question. Reference to the superintendent's map Appendix J shows that lot No. 188, which must be close to lot No. 187 the subject of sale No. 25 indicated in that map, is nearer the town, is near the junction of the Kwong Lee Bank Road and the Pending Road, it has water and electricity and is only half an acre in size. Lot 190, like lot 188, is also nearer to the wharf at Tanah Puteh than the two lands in question. In any event it is very small in area, it is one-fifth of an acre and its price per acre is not necessarily five times its purchase price.

Also it is fallacious to assume that because lot 188's market value on 13th August, 1958, was $15,000 per acre and lot 190's market price in May, 1960, was $68,000 per acre, in December, 1960, $91,000 per acre and in January, 1962, at $159,000 per acre, therefore the market value of similar land on 1st April, 1960, was $64,000 per acre, as indicated in the graph Annexure D. That graph is accurate only if there was evidence of a steady rise in the market value of similar lands. On the contrary, sale No. 26 in Annexure C of lot 8856, 0.51 acre in area, indicated a drop in price per acre from $13,700 on 19th November, 1959 to $8,140 on 23rd March, 1960.

Lot 133 having an area of 1.09 acres was sold by auction on 7th June, 1958, at $3,945 per acre, reference sale 22 in Annexure C and 4 in Appendix J; this was vacant industrial land, lease expiring in the year 2018. On 4th December, 1962, it was sold at $36,700 per acre. By means of the graph on Annexure E, Mr. Carter estimated its market value on 1st April, 1960, at $16,000 per acre. This again in my judgment is fallacious because any rise in the value of land is dependent on demand and is not necessarily a straight rise. Its value on 1st April, 1960, might just as well have been not much

more than its value in June, 1958. This is vividly illustrated by the sale history of lot 131, two lots away. It too is small (1.14 acres), industrial, and its lease expires in the year 2018. Yet (reference sale No. 20 in Annexure C) its price per acre on 7th June, 1958, was only $5,526, on 15th August, 1962 (over 2 years after the material date) $7,368 and 2 months later on 31st October, 1962, $70,175. Both lots 133 and 131 are close to the two lots in question.

Taking into account the 10 sales listed in Annexure A-1, Mr. Carter by means of the graph in Annexure F sought to prove that the commencing market value of the two lands in question on 1st April, 1960, was $15,500 per acre.

What were these sales?

First, sale No. 1 of lot 4097 having an area of 1.6 acres on 17th September, 1951, for $6,000 and sale No. 2 of lot 4098 having an area of 2.37 acres for $10,000. The price of the two sales averaged $4,030 per acre. Both lands are agricultural. Then the two lands, total area 3.97 acres, were sold together on 27th July, 1957, for $28,000, at an average price of $7,053 per acre Then on 20th October, 1958, occurred sale No. 11 of lot 183, half an acre in area, for $5,000 namely $10,000 per acre and sale No. 12 of lot 184 also half an acre in area at the same price. The titles of both lands specified residential and agricultural purposes; lot 183 was sold vacant and lot 184 next door with one attap house. These five transactions were joined by Mr. Carter by one line in Annexure F. The relevant sale numbers are indicated on the annexure by numbered circles. These five transactions occurred before the material date 1st April, 1960. Then on 8th June, 1961, occurred sale No. 25 of agricultural lot 9736 having an area of 0.25 acre, at a price of $5,000, namely $20,000 per acre and sale No. 27 of agricultural lot 8841 having an area of 0.33 acre on 2nd June, 1961, as to a half share at a price of $3,250 equivalent to $19,700 per acre and on 6th October, 1961, of the whole lot at a price of $12,000 equivalent to $36,364 per acre. The line in Annexure F joining the first five transactions namely sales number 1, 2, 3, 11 and 12 was then joined by Mr. Carter to these three transactions (sales number 25 and 27) on the graph Annexure F and indicated, according to Mr. Carter, a commencing market value of the two lands in question on 1st April, 1960, at $15,500 per acre

He did the same with sale No. 9 of agricultural lot 5736 having an area of 5.43 acres on 8th October, 1957, at $3,100 per acre and on 9th May, 1958, at $6,482 per acre, approximately two years before the material date. He joined these two transactions by a straight line and extended it to cross the datum to indicate the same commencing market value for the two lands in question. This lot 5736 had old rubber trees, but Mr. Carter's method of valuation was to ignore any increased value put on land for improvements on it so that in his view to obtain the price per acre it is enough to divide the sum total of the price paid for the land and the improvements by the total acreage. In my judgment this is not right; the value of land per unit of area must be separated from the value of improvements on it.

Lot 133 having an area of 1.09 acres was sold (sale No. 22 in Annexure C) on 7th June, 1958, at $3,945 per acre and lot 182 on 7th April, 1959 (sale No. 10) at $10,000 per acre. Mr. Carter's graph again seems to indicate a commencing market value of $15,500 per acre for the two lands in question on 1st April, 1960, by joining these two sales by a straight line on his graph and then extending it to cross the datum line. I am of the opinion that this is misleading, because as already stated lot 131, very similar to lot 133, on 15th August, 1962, fetched only $7,368 per acre.

All the sales regarded as relevant by Mr. Carter and included by him in Annexure A-1 related to small parcels of lands, varying in size from one-quarter of an acre to 5.43 acres, and I am of the opinion that the sale price per unit of area of a small parcel is higher than the sale price per unit of area of a large parcel.

Examination of the sales particularised both in Appendix J prepared by the superintendent and in Annexure C prepared by Mr. Carter shows that it is fallacious to assume that in every case there was during the material period a steady rise in the market value of lands in the vicinity, though generally speaking it is true that lands had been changing hands at a higher price in many cases.

For instance lot 508 (reference sale No. 2 in Appendix J and sale No. 17 in Annexure C) was sold on 14th December, 1959, for $1,515 per acre and on 23rd March, 1960, for $8,150 per acre. But when it was sold a third time seven months later the price dropped steeply to $2,860 per acre. This third sale is shown in the superintendent's Appendix J, but not in Mr. Carter's Annexure C.

It is equally fallacious to assume as Mr. Carter sought to prove by his graph in Annexure F that where there was a sale before the material date, 1st April, 1960, and one afterwards in 1962, an extension of a straight line joining the two sales to cross the datum line on the graph would indicate the estimated price on the material date. For instance, lot 507 (reference sale No. 3 on Appendix J and sale No. 19 in Annexure C) was sold on 14th December, 1959, at $1,520 per acre and on 4th December, 1962, at $165,620 per acre, but the fact that there had been a rise but not a steep rise in the value of this land on 1st

April, 1960, is shown by the fact that about 4 months later on 25th July, 1960, as indicated in Appendix J, it changed hands at only $3,140 per acre. This lot 507 is very close to the two lots in question.

Appendix J shows two other lands which dropped in price before the material date. Lot 8856 (reference sale No. 15) was sold on 19th November, 1959, at $13,700 and on 23rd March, 1960, at $8,150 per acre and lot 116 (reference sale No. 18) was sold on 28th August, 1959, at $23,600 and on 4th March, 1960, at $15,700 per acre. It is true that these two prices for lot 116 are more than Mr. Carter's estimated commencing market value for the two lands in question but it is to be noted that the price included, according to Appendix J, a house on the occasion of the first sale and two houses on the occasion of the second sale and also the land is only 0.28 acre in area and is situated according to the map in Appendix J not very far from the junction of the Kwong Lee Bank Road and the Pending Road and therefore closer to the heart of Kuching town.

It will be recalled that Mr. Carter's estimated market value of the first lot in question was $11,900 per acre and of the second lot $16,900 per acre and that the average price for the two lots was $13,900 per acre.

Examination of the sales made available shows three sales before 1st April, 1960, at a price exceeding $11,900 per acre, Mr. Carter's lower estimated value.

(a) Lot 116 (reference sale No. 18 in Appendix J) as already noted above changed hands on 28th August, 1959, at $23,600 per acre and on 4th March, 1960, at $15,700 per acre, but the land is only 0.28 acre in area and is closer to the town centre and the price included, as already said, one house on the occasion of the first sale and two houses on the occasion of the second sale.

(b) Lot 405 (reference sale No. 12 in Appendix J and sale No. 4 in Annexures C and A-1) was sold on 18th January, 1960, at $17,400 per acre. Counsel for the owners made much of this sale before this court, emphasising that it took place only three months before the material date, but this price included one attap house and the land itself was nearer the centre of the town and is only 0.93 acre in size and experience has shown that a small parcel fetches more per unit of area than a large parcel.

(c) Lot 2332 (reference sale No. 21 in Appendix J) was sold on 9th March, 1960, at $20,900 per acre, but again this land is closer to the town centre and is small in size.

In contrast to the above three sales, there were two sales in March, 1960, that is one month before the material date, at prices well below $11,900 per acre.

(a) Lot 508 (reference sale No. 2 in Appendix J and sale No. 17 in Annexure C) was sold on 23rd March, 1960, at $8,150 per acre and yet this land is small in size (0.35 acre), included one wooden house and is very close to the two lots in question.

(b) Lot 8856 (reference sale No. 15 Appendix J and sale No. 26 in Annexure C) was sold on 23rd March, 1960, at $8,140 per acre and yet this land is small in size (0.51 acre), included one wooden house and is closer to the centre of the town.

There were five sales after the material date at prices below $11,900 per acre.

(a) Lot 1120 (reference sale No. 13 in Appendix J and sale No. 24 in Annexure C was sold on 2nd July, 1960, at $9,200 per acre including one timber house and one garage, its size being 3.26 acres.

(b) Lot 507 next door to lot 508 (reference sale No. 3 in Appendix J and sale No. 19 in Annexure C) was sold on 25th July, 1960, at $3,140 per acre, though small in size being 0.35 acre. This lot is close to the two lots in question though further away from the town centre.

(c) Lot 508 next door to lots 507 and 509 (reference sale No. 2 in Appendix J and sale No. 17 in Annexure C) was sold on 15th October, 1960, at $2,860 per acre. This lot is small in size being only 0.35 acre.

(d) Lot 509 next door to lot 508 (reference sale No. 1 in Appendix J and sale No. 18 in Annexure C) was sold on 29th November, 1960, at $3,600 per acre and yet it is small, being 0.69 acre in size.

(e) Lot 182 (reference sale No. 11 in Appendix J and sale No. 10 in Annexure C) was sold on 30th November, 1960, at $11,550 per acre including one attap house and a few rubber trees. Again this lot is small in size being 0.52 acre.

There were several sales after the material date at prices exceeding $11,900 per acre, but in every case the land involved was small in area and all of the lands are nearer to the town centre than the two lands in question and some of them had houses.

(a) Lot 5936 (reference sale No. 22 in Appendix J) was sold on 9th July, 1960, at $14,400 per acre, but this land is small (0.47 acre), is nearer the town centre and included one wooden house.

(b) Lot 8032 (reference sale No. 23 in Appendix J) was sold on the same date as the above lot at $13 800 per acre, but here again the land is small (0.87 acre), is nearer the town centre and included a factory and other buildings.

(c) Lot 244 (reference sale No. 24 in Appendix J) was sold on 21st March, 1961, at $32,600 and on 22nd June, 1961, at $42,600 per acre, but this land again is small (0.23 acre), fronts a road close to the Kwong Lee Bank Road — Pending Road junction and is closer to the town centre.

(d) Lot 516 (reference sale No. 17 in Appendix J) was sold on 17th April, 1961, at $20,000 per acre, but it is small in size (0.13 acre) and is nearer to the town centre and included a timber house.

(e) Lot 8841 (reference sale No. 16 in Appendix J and sale No. 27 in Annexure C) was sold on 2nd June, 1961, at $19,700 and on 6th October, 1961, at $36,400 per acre, but here again the land is small in size (0.33 acre) and closer to the town centre.

(f) Lot 9736 (reference sale No. 14 in Appendix J and sale No. 25 in Annexure C) was sold vacant on 8th June, 1961, at $20,000 per acre, but again this lot is small in size (0.25 acre) and closer to the town centre.

(g) Lot 507 (reference sale No. 3 in Appendix J and sale No. 19 in Annexure C) was sold on 4th December, 1962, at $165,620 per acre. This land is close to and to the east of the two lands in question, but it is small in

size (0.35 acre), and as already indicated when sold on 25th July, 1960, three months after the material date it only fetched $3,140 per acre.

(h) Lot 133 (reference sale No. 4 in Appendix J and sale No. 22 in Annexure C) was sold on the same date, 4th December, 1962, at $36,700 per acre. This lot is further away from the town centre than the two lands in question, but it is small in size (1.09 acres). It fronts the river, is bounded on one side by a road and as already explained above a similar land not far away, lot 131, fetched only $7,368 per acre when sold on 15th August, 1962.

Examination of the above sales does not appear to support Mr. Carter's estimated market value for the 2 large lots in question.

As already stated, together with the lands in question, the Government also resumed 17 other parcels. The situation of these lands in relation to the two lands in question is shown in Appendix B-1. None of the owners of the other lands resumed was awarded more than $10,000 an acre.

The owners of 12 parcels accepted the superintendent's awards without question as follows:—

Lot 16180,	1.26 acres,	$ 6,000 per	acre plus something for improvements.
Lot 16181,	0.85 acre,	$ 6,000 per	acre plus something for improvements.
Lot 12287,	2.44 acres,	$ 7,000 per	acre.
Lot 11240,	0.93 acre,	$ 7,250 per	acre.
Lot 4097,	1.6 acres,	$ 7,250 per	acre plus something for improvements.
Lot 4098,	2.37 acres,	$ 7,250 per	acre plus something for improvements.
Lot 11239,	0.87 acre,	$ 7,340 per	acre.
Lot 181,	0.44 acre,	$10,000 per	acre plus something for improvements.
Lot 182,	0.52 acre,	$10,000 per	acre plus something for improvements.
Lot 183,	0.5 acre,	$10,000 per	acre plus something for improvements.
Lot 184,	0.5 acre,	$10,000 per	acre plus something for improvements.
Lot 185,	0.5 acre,	$10,000 per	acre.

The owners of five other parcels protested their awards whereupon the superintendent increased them to the following amounts:—

Lot 4729,	18.93 acres,	$ 5,000 per	acre plus something for improvements.
Lot 6868,	3.37 acres,	$ 5,935 per	acre.
Lot 5736,	5.43 acres,	$ 7,365 per	acre.
Lot 4415,	2.50 acres,	$ 7,750 per	acre plus something for improvements.
Lot 16688,	1 acre,	$10,000 per	acre plus something for improvements.

The awards and settlements varied from $5,000 to $10,000 per acre.

The owner of lot 4729 received in all $96,495, the owner of lot 4415 $30,315, the owner of lot 5736 $40,000 and the owner of lot 4098 $46,362. In my view these are sufficient in amount to make it worth the owners' while appealing to court if they had been dissatisfied with the market value put on the lands by the Government. The fact that they did not do so shows that in their view the value was fair.

Considering sales of other lands in the vicinity and the acceptance of large awards by the owners of four of the 19 parcels resumed, it would seem that in agreeing *in toto* with Mr. Carter's valuation the assessors and judge gave misleading importance to sales of small lots some of which were close to the town, as was done by the Zanzibar Court in *The Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co. & anor.*,[12] and to some sales long after the event, they omitted (they were not asked) to consider the effect on the market price a willing purchaser would be prepared to pay, of the risk of refusal or delay of subdivision permission, of the risk that the lands might never be required or might not be required for industrial and building purposes for a considerable time, nor did they consider the necessity of the prospective purchaser making allowances for interest on purchase price and development costs both foreseen and unforeseen over an uncertain period. As regards development costs, the agreed cost for fill up to 9 foot level alone was $159,900 though the superintendent contended that it was necessary to fill to a higher level, but be that as it may it is obvious that a lot of money has to be spent on fill.

What is the fair market value to be placed on the two lands in question? As already stated, the superintendent awarded about $5,460 per acre, offered $7,000 per acre and the High Court increased the award to $13,900 per acre. Taking into account all factors which should be taken into account it would appear that the proper value to be put on the two lands on the material date should be $8,000 per acre for the first lot and $9,000 per acre for the second lot and I would vary the award accordingly, except that the order for $4,000 agreed valuation for improvements on the second lot remains undisturbed. The superintendent to pay interest as under section 69.

Thomson L.P.: Before this morning I have had the advantage of reading the judgment which has just been delivered by my Lord. It expresses my own views so closely that to add anything would merely be to repeat in somewhat less felicitous terms what has just been said.

In my view the award in the High Court should be reduced from the figure of $607,000 to one, based on what my Lord has said, of $370,140. (Lot 16178) at $8,000 an acre and 17.82 acres (Lot 16179) at $9,000 an acre. The first of

these amounts to $205,760 and the second comes to $160,380 and to these I would add the agreed figure of $4,000 in respect of improvements, making a total of $370,140.

I express no opinion regarding costs at this stage.

Ong Hock Thye Ag.C.J. (Malaya): I have read the judgment of Suffian J., with which I am in entire agreement. I had made my own independent assessment of the market value of the two lots from the point of view of the potential property-developer and I do not think that any realistic appraisement will justify any higher price than $8,000 per acre for the first lot and $9,000 per acre for the second, which is the award of Suffian J.

As to costs, the respondents having succeeded at Kuching in obtaining an appreciable enhancement of the compensation originally awarded by the superintendent, my view is that there should be no costs for either party in the court below, but that the appellants do have their costs of this appeal.

Order accordingly.

HO MING SIANG v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Ong Hock Thye F.J.) January 27, 1966]

[K.L. — Federal Court Criminal Appeal No. X19 of 1965]

Internal Security — Consorting with members of Indonesian armed forces — Possession of firearm and ammunition — Defence of alibi — Admissibility of statement — Internal Security Act, 1960.

Criminal Law and Procedure — Charge — Date — Mistake — Not essential part of offence.

This was an appeal against a conviction on charges of consorting with members of the Indonesian armed forces, possession of a firearm and possession of ammunnition, offences under the Internal Security Act, 1960. The defence of the appellant at the trial was an *alibi* and he maintained that the statement alleged to be recorded from him was concocted by the police officers. The trial judge accepted the evidence of the Indonesian prisoners of war and held that this evidence was corroborated by the recorded statement of the appellant which he admitted in evidence.

Held: the learned trial judge in this case was correct in holding that the statement was freely and voluntarily given under proper caution and in rejecting the defence allegation that the statement was fabricated by the police.

Cases referred to:—

(1) *Law Kiat Lang* v. *Public Prosecutor* [1966] 1 M.L.J. 215, F.C.

(2) *R.* v. *Severo Dossi* (1918), 13 Cr.App.R. 158, 159.

FEDERAL COURT.

Lim Kean Siew for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This is yet another appeal arising out of the Indonesian invasion near Labis during the night of 1st/2nd September, 1964. The appellant was thought to have participated in that invasion and in consequence he was prosecuted on the following three charges under the Internal Security Act, 1960:—

"*1st Charge*: That you between 2.00 a.m. on the 2nd day of September and 6.00 a.m. on the 11th day of September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong *vide* FLN. 245 of 17th August, 1964, namely Tenang Kampong, Labis, in the district of Segamat, in the State of Johore, consorted with members of the Indonesian armed forces who carried firearms and ammunitions in contravention of the provisions of section 57(1) of the Internal Security Act, 1960, in circumstances which raised a reasonable presumption that you intended to act with such members of the said Indonesian armed forces in a manner prejudicial to public security and that you have thereby committed an offence punishable under section 58(1) of the said Act.

2nd Charge: That you at about 2.00 a.m. on the 2nd day of September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong *vide* FLN. 245 of 17th August, 1964, namely Tenang Kampong, Labis, in the district of Segamat, in the State of Johore, without lawful excuse carried a firearm, to wit, a LEE ENFIELD RIFLE, without lawful authority and that you have thereby committed an offence punishable under section 57 (1)(a) of the Internal Security Act, 1960.

3rd Charge: That you at about 2.00 a.m. on the 2nd day of September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong *vide* FLN. 245 of 17th August, 1964, namely Tenang Kampong, Labis, in the district of Segamat, in the State of Johore, without lawful excuse had in your possession 200 rounds of ammunition without lawful authority and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960."

With regard to the first of these charges, the dates are wrong and the charge was at no time amended but, as was pointed out in *Law Kiat Lang* v. *Public Prosecutor* (1) this is without importance. As was said by Atkin J. in the case of *Severo Dossi*:—(2)

"From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence."

The appellant was convicted on all three charges and sentenced to death. Against these convictions he has now appealed.

The appellant was arrested on 13th September, 1964, at Taiping, some 300 miles north of Labis and his trial commenced on 5th September, 1965.

The prosecution case was based on the evidence of three Indonesian prisoners of war and a statement alleged to have been made voluntarily by the appellant to the police at Labis on 22nd September, 1964.